

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA GROWERS'
ASSOCIATION, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF LABOR,
200 Constitution Avenue NW, Washington, D.C.
20210, and ACTING SECRETARY
OF LABOR SETH D. HARRIS, in his official
capacity,

Defendants.

Case No. 13 CV 468

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552, for injunctive and other appropriate relief and seeking the disclosure and release of agency records improperly withheld from the Plaintiff by Defendants the U.S. Department of Labor (“DOL”) and Acting Secretary of Labor Seth D. Harris in his official capacity (“the Secretary”).

Jurisdiction and Venue

2. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This court also has

jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue lies in the district under 5 U.S.C. § 552(a)(4)(B).

3. Plaintiff the North Carolina Growers' Association, Inc. ("NCGA"), is a non-profit growers' association based in Vass, Moore County, North Carolina. NCGA is the nation's largest provider of H-2A workers, providing approximately 7,500 workers per year to approximately 700 farmers in the State of North Carolina. NCGA is a North Carolina corporation.

4. Defendant DOL is a Department of the Executive Branch of the United States Government and is an agency within the meaning of 5 U.S.C. § 552(f), and is responsible for enforcement of most of the federal labor laws, including but not limited to the labor laws pertaining to seasonal foreign non-immigrant agricultural guestworkers under the so-called H-2A program ("H-2A workers"), and migrant and seasonal agricultural workers, whose terms of employment are governed by the Migrant and Seasonal Agricultural Worker Protection Act ("MSAWPA workers").

5. The Secretary is the acting head of the Defendant DOL and is sued in his official capacity.

DOL's Selective Enforcement of Labor Laws

6. Since at least early 2009, NCGA has had reason to believe that the DOL was selectively enforcing the laws pertaining to H-2A workers and MSAWPA workers by scrutinizing NCGA more closely than it did other H-2A associations and employers, as well as non-H-2A employers. Upon information and belief, this selective enforcement was undertaken in retaliation for NCGA's exercise of its rights of freedom of speech and

association under the First Amendment of the U.S. Constitution, which includes but is not limited to the following:

a. On June 9, 2009, NCGA and other growers' associations nationwide filed a lawsuit against the DOL and the Secretary of Labor, *North Carolina Growers' Association, Inc., et al. v. Hilda L. Solis, et al.*, in the United States District Court for the Middle District of North Carolina, Case No. 1:09-cv-411, challenging a rule promulgated by the Secretary governing the H-2A program. The Plaintiffs, led by NCGA, won a preliminary injunction and ultimately won summary judgment on the merits, a decision that was upheld on appeal to the U.S. Court of Appeals for the Fourth Circuit. As a result of this lawsuit led by NCGA, the DOL rule never went into effect.

b. The H-2A guestworker program, of which NCGA is an integral part in the State of North Carolina, is inherently in conflict with the Obama Administration's promotion of amnesty for undocumented workers. Over the years, NCGA has been a tireless advocate in the public sphere for continuation of the H-2A program and the adoption of H-2A standards that are workable for agricultural employers and the workers. This advocacy is not aligned with the views of the current administration.

c. On March 11, 2011, NCGA filed another lawsuit against the DOL, *The North Carolina Growers' Association, Inc., v. Hilda L. Solis, et al.*, in the United States District Court for the Middle District of North Carolina (Case No. 1:11-cv-198), this time alleging that its enforcement of the H-2A rule was selective, and

discriminatorily and retaliatorily targeted at NCGA and NCGA's membership. This lawsuit also alleged that certain provisions in the H-2A rule then in effect were arbitrary and capricious. NCGA voluntarily dismissed this lawsuit in July 2011, after the DOL promulgated standards that purported to be uniformly applied to all H-2A employers.

7. NCGA is informed and believes that the DOL has targeted it and its membership for selective enforcement based on the following, without limitation:

a. On or about March 25, 2011, only two weeks after NCGA had filed Case No. 1:11-cv-198 against the DOL, NCGA was notified by the DOL that applications it had filed on behalf of its membership were being rejected because the applications stated that applicants with felony convictions were not eligible for employment. NCGA requested further guidance from the DOL so that it could procure workers for its members without causing irreparable harm to the members' crops, but the DOL failed or refused to provide the requested guidance.

b. As set forth in more detail in Case No. 1:11-cv-198, NCGA was informed that the DOL was allowing other growers or associations to charge workers an illegal "recruitment/processing fee" while contending that NCGA and its membership were prohibited from charging the "recruitment fees."

c. As set forth in more detail in Case No. 1:11-cv-198, NCGA was informed that other growers or associations were allowed to file "blanket applications" for H-2A workers while NCGA and its membership were required to apply for workers strictly within the time frames set forth in the H-2A rule.

d. As set forth in more detail in Case No. 1:11-cv-198, NCGA was informed that other growers or associations were allowed to accept pre-screened referrals of workers and to limit the hours in which they accepted applications, while NCGA and its membership were required to conduct individual interviews of each applicant and to accept referrals from 9 a.m. to 4 p.m. Monday through Thursday, and from 9 a.m. to 2 p.m. on Fridays.

8. The DOL's selective enforcement of the H-2A rule is not only a violation of NCGA's constitutional rights, but it also puts NCGA at a competitive disadvantage with respect to other growers' associations and growers.

Plaintiff's FOIA Request

9. For reasons including but not limited to those set forth above, NCGA submitted a Freedom of Information Act ("FOIA") request on May 10, 2011, for "All Wage and Hour Investigations of non-H2A Agricultural Employers in the state of North Carolina for 2008, 2009 and 2010 under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act." NCGA provided contact information and offered to pay "any reasonable costs for reproducing these files." The content of the May 10, 2011 FOIA request is attached as Exhibit A.

Defendants' Failure to Timely Comply with Plaintiff's Request

10. On or about July 8, 2011, Jonesa Davis of the DOL contacted Lee Wicker, Deputy Director of NCGA, by telephone about the FOIA request. Ms. Davis and Mr. Wicker agreed that NCGA would narrow its request with respect to the 2010 records and that NCGA would pay the costs associated with responding to the request. Ms. Davis

followed up with an email to Mr. Wicker confirming their agreement, a copy of which is attached as Exhibit B. Mr. Wicker told Ms. Davis over the telephone on July 8, 2011, that NCGA would pay for the FOIA production.

11. Despite NCGA's agreement to narrow the request and to pay the costs associated with production, the DOL did not produce the documents. Accordingly, on or about April 13, 2012, Mr. Wicker contacted Ms. Davis again and asked about the status. Ms. Davis responded that she had "half" of the documents on her desk and was getting ready to produce them. Mr. Wicker followed up this telephone conversation with an email to Ms. Davis, confirming this time in writing that NCGA would pay the costs associated with responding to the FOIA request, which by that time had been pending for almost a year.

12. To date, the DOL has not provided the records requested by NCGA in its May 10, 2011, FOIA request, notwithstanding the FOIA's requirement of an agency response within twenty (20) working days. It has now been more than two years (more than 730 calendar days) since the FOIA request was made by NCGA.

13. NCGA has exhausted the applicable administrative remedies with respect to its FOIA request to the DOL.

14. The DOL has wrongfully withheld the requested records from NCGA.

Requested Relief

WHEREFORE, Plaintiff NCGA prays the Court for the following relief:

- 1) An Order directing the Defendants to disclose the requested records in their entirety and make copies available to NCGA;
- 2) An expedited hearing in this action;

- 3) An award of costs and reasonable attorneys' fees to NCGA; and
- 4) Such other and further relief as this Court may deem just and proper.

This the 10th day of June, 2013.

/s/W. R. Loftis, Jr.

N.C. State Bar No. 2774

Email: rloftis@constangy.com

/s/Robin E. Shea

N.C. State Bar No. 15862

Email: rshea@constangy.com

CONSTANGY, BROOKS & SMITH, LLP

100 N. Cherry St., Suite 300

Winston-Salem, NC 27101

Telephone: 336-721-1001

Facsimile: 336-748-9112

COUNSEL FOR PLAINTIFF